In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 701.

SYLVESTER POLIAFICO,
SALVATORE LAZZARO,
NUNZIO ROMANO,
BEN YOSLOVITZ,
ANTHONY CRISCI,
SALVATORE PERRI,
MICHAEL ERRA,
ANTHONY NASELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Now come Henry C. Lavine, Attorney for Sylvester Poliafico and Anthony Naselli; Jacob W. Friedman, Attorney for Salvatore Lazzaro and Nunzio Romano; Frank E. Steel, Attorney for Ben Yoslovitz; George J. Todaro, Attorney for Anthony Crisci; and William D. O'Neill and Nathan D. Seeberg, Attorneys for Salvatore Pieri and Michael Erra, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio, which Court imposed a prison sentence on each of the petitioners.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, p. 1a, is reported at 237 F. 2d 97. There was no opinion by the District Judge.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 31st, 1956 (App., *infra*, p. 32a). A timely petition for rehearing was denied on November 26th, 1956 (App., *infra*, p. 32a). On December 21st, 1956, Mr. Justice Reed duly extended to and including January 25th, 1957, the date for the filing of this petition. The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554 (a); Federal Rules of Criminal Procedure, Rule 17c.

QUESTIONS PRESENTED.

1.(a) Whether the reading from the Grand Jury testimony of Government witnesses Brunello and Artino, together with their statements previously made to the Government narcotic agents, over timely and proper objection of counsel, constituted reversible error in view of the fact that the answers of these witnesses to Government counsel were not such prior contradictory statements as to permit cross-examination to the extent shown in the record under the theory that same was being used to "refresh the memory" and also on the "ground of surprise."

(b) Whether the belated admonition of the Court to the jury to "forget" this testimony and "not to consider any of it," cured the error that was committed.

2.(a) Whether the refusal by the District Court to instruct the District Attorney to make available to the defense counsel the written statements of the witness Man-

danici in order that they be used as desired in cross-examination constituted reversible error.

(b) Whether such error was cured by an offer, four days after the conclusion of the witness Mandanici's testimony, to furnish these statements to the defense if the defense would recall the witness Mandanici for additional cross-examination.

3.(a) Whether in the face of an order of exclusion of witnesses, the fact that a defendant, Filicia, who sat in the courtroom for ten days in that capacity then suddenly entered a plea of guilty and immediately became a witness for the Government and testified in corroboration of other Government witnesses, over objection of counsel, constituted prejudicial and reversible error.

(b) Whether such conduct on the part of the Court in permitting this testimony over timely and proper objection constituted a mistrial.

4.(a) Whether the District Judge was right in excluding the testimony of Mrs. Giaimo on the ground that the defense was required to lay a foundation by first interrogating the witness Mandanici regarding his conversations with her, or whether it constituted error.

(b) Whether such refusal deprived the appellants of a defense which, if permitted, would have been supported by ample evidence, or whether it constituted reversible error on the ground that it violated the defendants' constitutional rights to present a theory of their defense.

5. Whether the Court's refusal to permit the disclosure of witness Mandanici's address was within the Trial Judge's discretion to control the scope and extent of cross-examination, or whether it was a deliberate failure to carry out the mandate of the Supreme Court in an exact situation in the case of *Alford vs. United States*, 282

U. S. 687, and whether the petitioners' constitutional rights were violated when the Trial Judge denied them the right of cross-examination.

6. Whether the District Court's conflicting and inconsistent instructions to the jury constituted prejudicial and reversible error, and whether such instructions violated the defendants' constitutional rights.

7. Whether the refusal by the District Court to charge as requested in regard to the defendant Poliafico's character evidence constituted prejudicial and reversible error.

8. Whether the constitutional rights of the petitioners were violated by the ruling of the Trial Judge when said Judge denied the petitioners' request for a hearing on the method and manner of the selection of the petit jury, it being claimed that the method of selection was an unconstitutional one.

9. Whether motions to dismiss the indictment and a verdict of acquittal in favor of petitioner Pieri should have been granted by the Trial Court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

10. Whether the Court's refusal to enter judgment of acquittal as to Counts 11 and 16 as against Pieri and Poliafico constituted reversible error inasmuch as variance was shown between the charge in the indictment and the proof that was adduced at the trial.

11. Whether there was competent proof that the substance alleged to have been sold by petitioner Crisci was heroin.

12. Whether there was error in the Court's refusal to correctly charge the jury on the effect of the defendant Crisci's failure to testify.

13. Whether the trial court erred in curtailing the cross-examination of the witness Mandanici on the supposed basis of privilege attaching to a prior attorney and client relationship.

STATUTES INVOLVED.

18 U. S. C. 2(a):

"2. Principals.—(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

18 U. S. C. 371:

"Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645 Sec. 1, 62 Stat. 701.)

21 U. S. C. 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States contrary to law, or conceals or in any manner facilitates the transportation, concealment, of such narcotic drugs after being imported shall be punished. * * * Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drugs, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

26 U. S. C. 2553(a):

"Purchase, sell, and distribute not in or from the original stamped packages, narcotic drugs: to wit, heroin, a derivative of opium, and cocaine, a derivative of coca leaves, and not having affixed thereon appropriate tax paid United States Internal Revenue stamps as required by law, in violation of Section 2553(a), Title 26, United States Code, and Section 2 (a), Title 18, United States Code."

26 U. S. C. 2554(a):

"Sell, barter, exchange and give away narcotic drugs, to wit, heroin, a derivative of opium, and cocaine, a derivative of coca leaves, not in pursuance of a written order of the person to whom they were sold, bartered, exchanged and given away, on a form to be issued in blank for that purpose by the Secretary of the Treasury of the United States, in violation of Section 2554(a), Title 26, United States Code, and 2(a), Title 18, United States Code."

Federal Rules of Criminal Procedure, Rule 17c: 15 F. R. D. 367.

STATEMENT.

This proceeding arose by virtue of an indictment charging conspiracy to violate narcotic laws and violations of narcotic laws in the Northern District of Ohio and other districts, and resulted in a trial in the District Court at Cleveland, Ohio, lasting about six weeks, before a jury. Eighteen of the defendants who went to trial, including these petitioners, were found guilty and were sentenced by the Court. These petitioners were sentenced as follows:

SYLVESTER POLIAFICO—sentenced to imprisonment for 5 years on Count 1, 5 years on Count 2, 5 years on Count 11, and 5 years on Count 16, and fined $25.00 each on Counts 2, 11 and 16, with fine suspended. The sentence imposed on Count 2 to

run concurrently with that imposed on Count 1, the sentence imposed on Count 11 to run consecutively with that imposed on Counts 1 and 2, and the sentence imposed on Count 16 to run consecutively with that imposed on Counts 2, 11 and 1, making a total of 15 years.

SALVATORE PIERI—sentenced to imprisonment for 5 years on Count 1, 5 years on Count 11, and 5 years on Count 16 and fined $25.00 each on Counts 11 and 16, with fine suspended. The sentence imposed on Count 11 to run concurrently with that imposed on Count 1, and the sentence imposed on Count 16 to run consecutively with that imposed on Counts 1 and 11. Total 10 years.

MICHAEL ERRA—sentenced to imprisonment for 5 years on Count 1.

ANTHONY NASELLI—sentenced to imprisonment for 4 years on Count 1.

NUNZIO ROMANO—sentenced to imprisonment for 5 years on Count 1 and 5 years on Count 2, with the sentences to run concurrently, and fined $10.00, with fine suspended.

SALVATORE LAZZARO—sentenced to imprisonment for 3½ years on Count 1.

BEN YOSLOVITZ—sentenced to imprisonment for 3½ years on Count 1 and 3½ years on Count 2, and fined $25.00 with fine suspended. Sentence on Count 2 to run concurrently with sentence imposed on Count 1.

ANTHONY CRISCI—sentenced to imprisonment for 5 years on Count 1.

The indictment contained sixteen counts consisting of one count of conspiracy and fifteen substantive offenses. It was claimed on the part of the Government that these petitioners conspired together for the purpose of violating

the laws and statutes mentioned hereinabove, and as stated before, the trial lasted about six weeks and upon conviction the above-mentioned sentences were imposed. Bail was denied by the Trial Judge but was granted by the United States Court of Appeals for the Sixth Circuit upon application.

This case was argued in the Sixth Circuit at Cincinnati, Ohio, on February 16th, 1956, and supplemental typewritten briefs were filed after argument. The Court made a finding and wrote an opinion as of August 31st, 1956, which is included in the appendix attached hereto.

REASONS FOR GRANTING WRIT.

The opinion of the Court of Appeals (Appendix pages 1a to 32a, *infra*) presents several questions of law, and, in our opinion, in a number of instances this Appellate Court opinion conflicts with opinions of the United States Supreme Court on similar questions. We also believe the view that was taken by the Appellate Court is contrary to the actualities as they occurred in the Trial Court, and it does appear that in a great many instances the rulings of the District Judge, which were affirmed by the Appellate Court, were partial to the Government. In many instances these rulings constitute prejudicial error, in the opinion of counsel herein, and at least two occasions can be found in the record which called for a mistrial, and a mistrial should have been granted. Undersigned counsel are not unappreciative of the fact that brevity is of the essence in a petition for certiorari, but in view of the number of petitioners, the length of time that the trial consumed, and the extraordinary length of the opinion, it is mandatory upon us that we set forth before this Honorable Court the necessary and decisive questions of law as they appear to us, fully

realizing that it is not possible to set forth in this petition for certiorari all the legal questions that were presented and the rulings thereon. .

QUESTION NO. 1.

(a) Whether the reading from the Grand Jury testimony of Government witnesses Brunello and Artino, together with their statements previously made to the Government narcotic agents, over timely and proper objection of counsel, constituted reversible error in view of the fact that the answers of these witnesses to Government counsel were not such prior contradictory statements as to permit cross-examination to the extent shown in the record under the theory that same was being used to "refresh the memory" and also on the "ground of surprise."

(b) Whether the belated admonition of the Court to the jury to "forget" this testimony and "not to consider any of it," cured the error that was committed.

It is our belief that the Appellate Court was probably in error when it sanctioned the Trial Judge's rulings on admission of the Grand Jury testimony of Brunello and Artino over strenuous objection of counsel. It must be kept in mind here that both these witnesses had previously testified before the Grand Jury, and when Brunello took the stand in the case before the petit jury his first answer to the question of the District Attorney was to the effect that he did testify before the Grand Jury but all that he told the Grand Jury were lies. He did not say that he did not remember, or that he had forgotten, or that he did not want to testify. He merely said, to begin with, that all of his previous testimony before the Grand Jury was false. In plain words, he was confessing to perjury. The District Attorney then asked for the right to cross-examine his wit-

ness on the ground that he desired to refresh his memory, and on the further ground of surprise. Defense counsel objected on the ground that there was nothing to refresh, that there was nothing here to refresh the witness' memory because the witness did not claim that he had forgotten. And on the question of surprise, that that alone does not constitute surprise because there was no contradictory testimony as yet and therefore no damage. We feel that the District Attorney should then have stopped, removed the witness from the stand, and taken proceedings to indict for perjury (which he later did anyway). But the District Attorney proceeded, with the Court's consent over objection of defense counsel, to read to the witness questions and answers of almost sixty pages of Grand Jury testimony. In that way, the District Attorney inflicted damage to the defense because he was permitted in that manner to not only impeach his own witness but to place before the petit jury testimony that was given to the Grand Jury seven months prior under the misnomer of refreshing his memory and on the ground of surprise. It has been our contention throughout that no damage was done to the case up to the point when the District Attorney was given permission to use the Grand Jury testimony in the manner that it was used; that whatever damage done was done by the Government, and they could not claim any damage to their case up to that point. Also, inasmuch as they are not able to claim any damage, the mere surprise is not sufficient because if there is surprise it must be coupled with a damage, "**and the damage claimed must not have been self-inflicted by continuing to put in damaging testimony after the witness' hostility or change of front has been discovered in order to open the gate to let his favorable ex parte statements in.**" (*Young vs. United States,* 97 F. 2d 206.)

Furthermore, and as was mentioned in the brief in the Court of Appeals by appellant Yoslovitz, wherein his counsel states that these witnesses, Brunello and Artino, were questioned as to their Grand Jury statements and their statements to the agents without being asked direct questions laying the foundation for cross-examination or impeachment, he points out that the effect of this method of propounding the previous questions and answers in the Grand Jury testimony and in the statements given to the agents was to introduce hearsay testimony, and the fact that the Court instructed the jury to disregard such questions and answers certainly could not efface the impression that such testimony, improperly received, must have had upon the jury. As one reviewing Court said, it would be impossible in the trial of a case to allow such testimony in and then tell the jury to disregard it and eradicate it from their consideration.

Young vs. United States, 214 F. 2d 232 at 239:

> "We conclude that the reading before the trial jury of the Grand Jury testimony was within neither the rule for refreshing a witness' recollection nor for cross-examination, a witness turning hostile, nor for impeachment, and comes within no exception to the rule excluding hearsay."

In the case at bar this Grand Jury testimony was used to impeach their own witness and is in line with the case of *United States vs. Socony-Vacuum Oil Company*, 310 U. S. 150, 60 S. Ct. 811, where on page 849 the Court said:

> "If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, **it would be reversible error.** Likewise there would be error where under the pretext of refreshing a witness'

recollection the prior testimony was introduced as evidence." (Emphasis ours.)

Here the Court also cites the case of *Rosenthal vs. U. S.*, 8th Cir., 248 F. 684-686. The Court continues:

> "But here the Grand Jury testimony was used simply to refresh the recollection of material facts, not as independent affirmative evidence. *Furthermore, it was not used for impeachment purposes* * * *." (Emphasis ours.)

Again, on page 850 in the *Socony-Vacuum* case, the Court says:

> "The trial judge, as we have said, was alert to stop impeachment."

As is contended by counsel for Lazzaro and Romano wherein he stated that the (District) Court permitted extensive testimony by Government agents as to the circumstances underlying and surrounding the taking of the statements of Brunello and Artino, this was done despite defense objection. The essence of the Court's ruling was as follows:

> "The Court will permit this testimony, as the Court permitted the other testimony as to the method and procedure followed in taking the statements of these witnesses, so that the jury may have before it the statements of the Government agents as well as the statements of the witnesses whose statements were taken as to the manner and method by which the statements were obtained. For no other purpose may this evidence be considered."

It must be remembered that the Government agents were not on trial, nor was the jury called upon to evaluate or adjudge the propriety of their methods. The conclusion is irresistible that the only purpose in introducing this proof was further to fortify the extraneous statements and

grand jury testimony supposedly referred to for a limited purpose. If we assume arguendo that such a purpose was proper, surely the Government should not have been permitted to go to the extreme of bolstering that rigidly qualified proof by a mass of testimony designed to give it affirmative force.

The instructions as to Artino's Grand Jury testimony were inadequate and confusing. Appellant Poliafico has quoted at length from the instructions pertaining to the Brunello situation, to wit, that "all the testimony that relates to the questions and answers purportedly given by this witness before the grand jury must be disregarded by you and removed from your minds entirely." However ineffective this must have been, the Court did not even go so far concerning Artino, merely saying:

> "Now, insofar as the testimony of this witness referred to those statements purportedly made by him before the grand jury and to those statements which he claims were made by someone else in the statement taken in the narcotic bureau, they are not to be considered by you as evidence against any defendant in this case."

Accordingly, even if the evidence had been properly received—which we challenge—the foregoing was certainly not a charge to delete it from the minds of the jurors or to disregard it. If it was not to be considered as evidence against any defendant, for what purpose was it to be considered at all? Certainly the jury could infer that Artino had repeatedly accused the defendants of criminal acts. In reading the instruction long afterwards and analyzing its language, one must give it meticulous attention in the effort to ascertain its significance. As an oral direction to a jury, which necessarily could not have the benefit of scanning it in writing, it is obscure to the point of defeating ready intelligibility.

Finally, on the subject of the futility of asking juries to disregard certain important testimony, we desire to add to the authorities cited the trenchant language of Mr. Justice Jackson in *Krulewitch vs. United States*, 336 U. S. 440, 93 L. Ed. 790:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

And as was said by Judge Learned Hand in the case of *Nash vs. U. S.*, 54 F. 2d 1006, 1007:

> "* * * that is the recommendation to the jury of a mental gymnastic, which is beyond not only their powers, but anybody else's."

QUESTION NO. 2.

(a) Whether the refusal by the District Court to instruct the District Attorney to make available to the defense counsel the written statements of the witness Mandanici in order that they be used as desired in cross-examination constituted reversible error.

(b) Whether such error was cured by an offer, four days after the conclusion of the witness Mandanici's testimony, to furnish these statements to the defense if the defense would recall the witness Mandanici for additional cross-examination.

The Government concedes that these statements were withheld from defense counsel until four days after Mandanici had completed his testimony. The fact that cross-examination of Mandanici could then be resumed did not, we submit, operate to undo the serious disadvantage of not having the statements during the original cross-examination. Especially in view of the impatience of the Trial Court and its understandable desire to accelerate the pro-

ceedings, appellants could not have possibly utilized the tardy proffer to the same advantage as if the statements had been accessible in the first instance.

In this connection the case of *United States vs. Carter*, 15 F. R. D. 367, on page 368 holds:

> "If a witness is called by the government, any written statement signed by the witness and in government's possession should be made available to defense counsel *prior to cross examination*, but such statement need not be produced in advance of trial. Fed. Rules Crim. Proc. rule 17(c), 18 U. S. C. A." (Emphasis supplied.)

It is clear that no conviction of petitioners Poliafico, Romano and Lazzaro could have been obtained without the testimony of Mandanici. We refer to the transcript for the occasions when he mentioned these petitioners, in some instances by hearsay testimony.

The Court's ruling precluding the defense from examining these concededly existing statements foreclosed a fertile field of potential inquiry.

The holding in *United States vs. Krulewitch*, 145 F. 2d 76, in the Second Circuit, is persuasive that the refusal of an inspection of the statement of an important prosecution witness is reversible error. Although in that case the appellant was convicted on a retrial, it is noteworthy that the second conviction was reversed by the Supreme Court of the United States (see 336 U. S. 440, 93 L. Ed. 790), for an erroneous ruling as to the admissibility of evidence, and never retried.

QUESTION NO. 3.

(a) Whether in the face of an order of exclusion of witnesses, the fact that a defendant, Filicia, who sat in the courtroom for ten days in that capacity then suddenly entered a plea of guilty and immediately became a witness for the Government and testified in corroboration of other Government witnesses, over objection of counsel, constituted prejudicial and reversible error.

(b) Whether such conduct on the part of the Court in permitting this testimony over timely and proper objection constituted a mistrial.

We do not believe that the circumstance of Filicia's being a defendant who on the tenth day of trial changed his plea to guilty and assumed the role of a Government witness justified a departure from the rule that witnesses be excluded prior to their being called. The Government supposedly intended to present his case without his help, and there is no exigency incident to the administration of justice which necessitated the utilization of the opportunity to procure his testimony. The situation comes within the prohibition of *Caldwell vs. United States*, 205 F. 2d 879.

Particular stress should be placed upon the avenues opened to duplicity and fraud in an approval of the procedure allowed herein. In every case involving a number of defendants, it would be a tremendous, although improper, advantage to the prosecution to have in the councils of the defense one of the accused who is nominally standing trial, but with the intention and plan that at a suitable juncture he will change his plea and cast his lot —including all that he knows and all that he has surreptitiously learned—with the Government. Confidential communications between attorney and client would be

nullified, and openings for overreaching and oppression multiplied.

The injustice of the situation is strikingly illustrated by envisioning a contrary state of affairs. Suppose one of the Government agents becomes convinced in the course of his investigation that the indicted defendants are innocent and, in furtherance of what he honestly believes to be right, communicates with their counsel and informs them of the proof which the Government proposed to adduce, pointing out its inadequacy. All concerned, to say the least, would be viewed as engaged in a conspiracy to obstruct justice. If there be anything to the presumption of innocence and the rights of an accused, prosecutors should not be armed with this new weapon which is so palpably susceptible of abuse.

We believe that the motion for a mistrial should have been granted.

QUESTION NO. 4.

(a) Whether the District Judge was right in excluding the testimony of Mrs. Giaimo on the ground that the defense was required to lay a foundation by first interrogating the witness Mandanici regarding his conversations with her, or whether it constituted error.

(b) Whether such refusal deprived the appellants of a defense which, if permitted, would have been supported by ample evidence, or whether it constituted reversible error on the ground that it violated the defendants' constitutional rights to present a theory of their defense.

When Mrs. Josephine Giaimo was offered as a witness for the defendants the District Attorney objected and asked for an offer of proof. After hearing the offer of proof, the Court would not permit the defense to introduce

this testimony on the ground that, except for one statement, it would be irrelevant. This ruling was clearly erroneous.

The offer of proof showed that Mrs. Giaimo would have testified that she was Mandanici's landlady in 1953, during the period when he was supposed to be taking trips to Erie, Pennsylvania, and Buffalo, New York; that Mandanici talked to her about several trips which he was making, but not to Erie or Buffalo; that Mandanici used her telephone to make several calls to Boston, California and other places; and that he once offered her $500. to go to Chicago to pick up "a package" for him. The Court stated that in his opinion this testimony could not be considered "even remotely relevant" and "does not tend to disprove anything testified to by * * * Mandanici."

The Court's ruling deprived the defense of its constitutional right to present vital evidence that would contradict the chief witness for the Government. In evaluating the offer of proof the Court must assume that the proof could have been made. In the language of Judge Learned Hand in *United States vs. Krulewitch,* 145 F. 2d 76, 80 (2nd Circuit 1945), 336 U. S. 440:

> "* * * the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for truth * * *."

See also *Wigmore on Evidence,* Section 27.

It is the contention of petitioners that it was not necessary to establish first by the cross examination of Mandanici anything pertaining to the proffer that defense counsel made because our witness' testimony constituted a theory of part of our defense which we were entitled to present and which the Court deprived us of this right by denying Mrs. Giaimo the right to testify. Our exception

was duly taken. The Government's position is not a tenable one when it contends that the witness should first be asked if he had a conversation with Mrs. Giaimo or if he ever obtained narcotics from anyone in Chicago.

QUESTION NO. 5.

Whether the Court's refusal to permit the disclosure of witness Mandanici's address was within the Trial Judge's discretion to control the scope and extent of cross-examination, or whether it was a deliberate failure to carry out the mandate of the Supreme Court in an exact situation in the case of Alford vs. United States, 282 U. S. 687, and whether the petitioners' constitutional rights were violated when the Trial Judge denied them the right of cross-examination.

The Trial Court's ruling that the witness Mandanici was not obliged to disclose his address at the time of the trial constituted reversible error.

The testimony of the witness Mandanici occupies some 600 pages of the transcript of testimony. His direct and cross-examination went to great lengths. One of the important features of the inquiry related to the circumstances under which he became a Government witness. More than a year had elapsed between his arrest on October 22, 1953, and the beginning of the trial. It appears that he had been released on bond; on February 12, 1954, he pleaded guilty; he was sentenced to a term of five years; he reached the prison at Milan about February 20, 1954, remaining there for thirty days; he was then taken to Terre Haute, where he stayed until April 25, 1954; thence he was taken to a county jail somewhere in Ohio. Therefore, this latter undisclosed jail was where he had been residing for more than six months before the trial. He was

asked the city where it was located, and his answer was, "I don't want to say where it is, your Honor." He added that he did not want any one to know he was there. The Court sustained him in this refusal, holding:

> "Where he is is of no importance."

The Court held that it had no materiality, and counsel duly took "exception to the Court's ruling that the witness has the right to refuse to answer where he is at present being detained."

Knowledge of the residence of the witness, though it was a certain jail, might well have opened a broad field of interrogation as to the activities and preparation for trial in the preceding half year. In a lengthy trial such as this, counsel might have deemed it expedient and helpful to subpoena the warden or other custodian of the witness, as well as the jail records, to show who had visited the witness and to establish the chain of events leading up to his presence on the stand. The environment of a witness is always a fundamental in the approach to a thorough cross-examination, and the barring of this avenue effectively kept from the jury a mass of information which necessarily bore on the credibility of the witness.

Nor is this a technical or unsubstantial point, for the Supreme Court of the United States has ruled that it is sufficient in and of itself to require a reversal of a conviction. In *Alford vs. United States*, 282 U. S. 687, 75 L. Ed. 624, the witness involved was also in federal custody at the time of the trial, although not yet convicted—which makes the case even stronger than the one at bar. Mr. Justice Stone wrote for the unanimous Court:

> "Upon cross-examination questions seeking to elicit the witness' place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination. * * *

"Cross-examination of a witness is a matter of right * * * Its purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; * * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * *

"The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. * * *

"But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution * * * Nor is it material, as the court of

> appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention."

Without quoting further, we desire to point out that the Supreme Court concluded that the Trial Court had cut off at the outset all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. The Court declared that "this was an abuse of discretion and prejudicial error." It was not deemed necessary to pass upon any other point in the case, and the judgment was reversed for that error alone.

QUESTION NO. 6.

Whether the District Court's conflicting and inconsistent instructions to the jury constituted prejudicial and reversible error, and whether such instructions violated the defendants' constitutional rights.

It has been our contention throughout this brief that the District Court was in error when he permitted the reading, question by question and answer by answer, from the statements given to the narcotic agents at a previous time by both Brunello and Artino; also, that the Court erred in permitting the District Attorney to read question after question and answer after answer from the Grand Jury transcript of the testimony of these two witnesses, which was given at a time of about seven months prior to the beginning of this case; all over the objection of counsel. It is our belief that the errors committed by the Trial Court are prejudicial and reversible on the grounds that we alleged above.

We also believe that the errors complained of by permitting the cross-examination for the introduction of the Grand Jury testimony as well as the prior statements into this case could not be cured by a mere instruction to the jury to forget the entire matter because, as we argued, the Grand Jury testimony and the statements which were taken at a previous time and under different conditions were actually used to substitute for the testimony that was being taken before the present petit jury in this case, and that is not the kind of testimony that could be removed from anyone's mind by a mere request or instruction by a judge to do so.

Because of that we feel that in the charge the Court gave he also committed error because the Court distinctly gave two separate and conflicting instructions, one of which was very damaging and prejudicial to this appellant, and these instructions were on the very same Brunello and Artino testimony.

To be specific, the Court told the jury, in substance, that he was reminding them that he had previously instructed them:

> "To disregard all the questions put and the answers given by those witnesses in previous statements or Grand Jury testimony. Those instructions are reaffirmed, and you are instructed that you must remove from your minds entirely any impressions created by reference to such statements or testimony.
>
> "* * * and you will therefore disregard them entirely.
>
> "* * * but it is solely on the slight possibility that there might be some slight impression remaining in your minds about this that I again say to you that it is your duty to eradicate them completely from your minds."

After instructing the jury to entirely forget this part of the testimony and to eradicate anything that might have been left of it from their minds, the Court then takes up the matter himself and instructs the jury as follows:

> "The testimony of the Government agents is not entitled to any greater weight than that of other witnesses simply because they are agents of the Government. But you are to weigh and evaluate their testimony by the same standards that you apply in determining the weight to be given to the testimony of each and all of the other witnesses. But I should say to you that the testimony of the Government agents is not to be given any less weight because witnesses, in an attempt to discredit them, have testified that they used threats and fraudulent and deceptive means to obtain statements from the witnesses, unless you believe that testimony. *You will recall that at least two witnesses, Brunello and Artino, who repudiated their sworn statements before the Grand Jury, so testified; and in weighing the testimony of these witnesses,* and the testimony given in repudiation and denial thereof by the agents, *take into consideration and remember the fact that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury.*" (Emphasis supplied.)

We believe the first instruction did not cure the error that the Court committed but we feel that the latter statement was certainly prejudicial when the Court again calls the attention of the jury and asks them to weigh the testimony of these two witnesses, and in fact, asks them to remember the very testimony he previously instructed them to forget and not to believe the witnesses because they repudiated their former testimony that they gave before the Grand Jury and in their statements, *and the Court did this in spite of the fact that he had asked the jury previously to forget the entire matter and not to permit any portion of it to remain in their minds.*

That instruction certainly brought back to the jurors' minds whatever they wanted to forget, if they could forget it. Those are certainly inconsistent charges, prejudicial to the defendants in this case and particularly to the appellant Poliafico. The jurors certainly could not forget anything of this last instruction even if they wanted to because the Court expressly asked them to remember. He really requested them not to forget, and the words he used were:

> "You will recall * * *
>
> "* * * the testimony given in repudiation and denial thereof by the agents, *take into consideration and remember the fact* that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury." (Emphasis supplied.)

Counsel cannot at this time think of any words that could be considered stronger emphasis than the Court placed in his last instruction where he asked the jury to remember the repudiation by these two witnesses, after naming them, of their previous testimony before the Grand Jury and to remember they said they swore falsely when they gave that testimony. This last charge definitely, in our opinion, is reversible and prejudicial error, if nothing more were added. We took special exception to this part of the Court's charge.

There are several cases we desire to cite in support of our contention.

In the case of *United States vs. Donnelly*, 7th Cir., 179 F. 2d 227, on a similar question where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, it was held reversible error results. This same *Donnelly* case cites the case of *United States vs. Sherman*, 2nd Cir., 171 F. 2d 619, wherein the Court dealt with a situation also similar to the one we have in our

case. In this case the Court admitted a second statement which was consistent with the testimony given at the trial, but which was inconsistent with an earlier statement, and then the Court held such admission was reversible error. In discussing the question of the inconsistency of conflicting instructions on page 233 of the *Donnelly* case, *supra*, the Court says:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error."
>
> (Citing: *Nicola vs. United States,* 3rd Cir., 72 F. 2d 780; *McFarland vs. United States,* D. C. Cir., 174 F. 2d 538, 539.)

Continuing:

> "A conviction ought not to rest on an equivocal direction to the jury upon a basic issue."
>
> (Citing: *Bollenbach vs. United States,* 326 U. S. 607, 66 S. Ct. 402.)

In the case at bar we are not overlooking the fact that it is our claim the Court could not cure by a mere instruction to the jury to forget all the inadmissible evidence that he permitted it to hear. This the Court did not only do in the one instance of Brunello but also in the second instance of Artino. However, we feel that we ought to set forth in this argument all of the viewpoints of the many Courts who have handled similar situations. We wish to also show herein that even if the Court's first instruction to the jury, to forget all of this testimony that was admitted into the record over objection, were construed as a proper instruction, then the second instruction certainly did considerably more damage. It reminded the jury of the fact that these two witnesses repudiated the testimony theretofore given to the Grand Jury and asked this

jury to therefore weigh their testimony affecting other Government witnesses and to keep in mind and "*remember the fact that those who testified against them did repudiate sworn testimony that they gave before the Grand Jury.*"

To the same effect the case of *Nicola vs. United States*, 72 F. 2d 780, on page 787, holds as follows:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

To the same effect, also, is the holding in the case of *McFarland vs. United States*, 174 F. 2d 539, and *Patterson vs. United States*, 183 F. 2d 687-690.

In one of the very late cases, *Frank vs. United States*, 220 F. 2d 559, 10th Cir., 1955, the Court reversed for the same reasons as cited in the *McFarland* case, *supra*.

We therefore are of the opinion that the conflicting instructions by the Court, as stated above, resulted in prejudicial and reversible error.

QUESTION NO. 7.

Whether the refusal by the District Court to charge as requested in regard to the defendant Poliafico's character evidence constituted prejudicial and reversible error.

The District Court was requested to charge the jury in behalf of Poliafico, as follows:

> "Character evidence has been introduced in behalf of the defendant tending to establish his good character and reputation. The Court therefore charges you that such evidence may in itself be suffi-

cient to create a reasonable doubt in the minds of the jury as to the guilt of the defendant."

The Court, however, did not charge as requested but did charge as follows:

> "The defendant Poliafico has offered evidence here of his good reputation. You will consider this evidence and determine its weight, together with all the other evidence in the case, in arriving at your verdict as to the guilt or innocence of the defendant Poliafico."

To which, exception was taken.

We think the law is plain in a case such as this where practically all of the evidence introduced comes into the case through accomplices, convicts, witnesses who were then imprisoned for other crimes, and generally unreliable persons in every way, that such testimony should not be placed on an even keel and on the same level with testimony of disinterested and respectable witnesses. It is in just such a case as ours that a particular charge of character testimony should be given and it is not sufficient merely to do what the Court did in this case with character evidence.

After all, this appellant has never been convicted of a crime and his word surely is as good or better than the accomplices' testimony that was used against him. Poliafico introduced in his behalf, for character and reputation testimony, several persons both disinterested and respectable, people who have known him for more than ten years, and who testified as to his good reputation for truth, veracity, industry, and to his being a law-abiding citizen. Because of that, the nature of this case, and the kind of witnesses who testified against him, this appellant requested the Court to charge the jury that such character

evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt as to the guilt of the defendant.

We therefore contend that the charge the Court did give, as stated hereinabove, is far from meeting the requested character and reputation charge, also stated above, and the Court's refusal to give the charge as requested constitutes reversible error. In behalf of this contention we beg to cite the case of *United States vs. Donnelly*, 179 F. 2d 227. In this case, also, an accomplice's testimony was relied upon to make the case for the Government and a request on character testimony came in on behalf of the appellant-defendant which was denied by the Court in a similar manner as was done in the case at bar. On page 233 of that case the Court held:

> "The defendant requested the Court to instruct the jury that character evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt as to the guilt of the defendant. The Court refused to so instruct, saying to the jury:
>
> 'That testimony (referring to defendant's reputation), is competent testimony and you may take it into consideration, together with all the other facts and circumstances in the case, and this testimony may be considered by you in reaching your verdict. * * *'
>
> "We think the instruction formally requested by the defendant should have been given. The outcome of the case depended largely upon the jury's appraisal of the credibility of Hendrixson and of the defendant. Under quite similar circumstances in *Snitkin vs. United States*, 265 F. 489, this Court held the failure to give the instruction here requested was reversible error."
>
> (Citing: *Miller vs. United States*, 10th Cir., 120 F. 2, 968.)

In *Edington vs. United States*, 164 U. S. 361, at page 366, the Court said:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevent to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing."

The case of *United States vs. Donnelly, supra*, in our opinion fits our case so perfectly that we desire to quote the last paragraph verbatim and apply it to our case. The Court therein says:

> "The question before us is: What effect did the errors hereinbefore described have, or what effect may they reasonably have had upon the jury's decision? (*Kotteakos vs. U. S.*, 328 U. S. 750-763, 66 S. Ct. 1239.)
>
> "This was a close case, depending largely upon the credibility given to the testimony of an alleged accomplice. In *Berger vs. U. S.*, 295 U. S. 78-89, 55 S. Ct. 629, the Supreme Court characterized the case against Berger for conspiracy as 'weak' depending as it did upon the testimony of Katz, an accomplice. We feel the errors were not harmless (Rule 52, Federal Rules of Criminal Procedure; *Bollenbach vs. United States*, 326 U. S. 607, 66 S. Ct. 402; *Bihn vs. United States*, 328 U. S. 632, 66 S. Ct. 1172), and conclude that their cumulative effect was to prejudice substantial rights of the defendant to the end that the judgment of guilty herein cannot be sustained.
>
> "Reversed and remanded for a new trial."

Our case is in exactly the same situation and position that the *Donnelly* case speaks of. We feel that the same rulings and the same decision should apply to the case at bar.

In addition to the cases cited above, counsel desires to cite the case of *Hayes vs. U. S.*, 227 F. 2d 540, where on page 545 the Court says:

> "In its instruction the Court failed to tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence might be convincing."

QUESTION NO. 8.

Whether the constitutional rights of the petitioners were violated by the ruling of the Trial Judge when said Judge denied the petitioners' request for a hearing on the method and manner of the selection of the petit jury, it being claimed that the method of selection was an unconstitutional one.

In the course of empaneling the trial array, counsel for defendant-appellant Pieri made statement and representation to the Court, to the effect that from information then available to such counsel for Pieri, and from an examination of the panel of trial jurors summoned for that purpose, it appeared to be the fact, and that counsel for Pieri believed, that discrimination against and an exclusion of various racial and national groups had occurred, and that it specifically appeared that Negro, Italian and Slavic jury representation on such jury panel did not exist, or that only a token representation of such groups existed.

Counsel for defendant-appellant Pieri thereupon demanded a hearing in connection with the facts relative to the method and manner of selection of the trial array, and demanded a hearing as to similar facts relative to the

method and manner of selection of the Grand Jury which returned the indictment herein.

Counsel for Pieri also stated and represented to the Court, that from information available to such counsel, good grounds appeared to exist so as to believe that the Jury Commissioner appointed in and for the Federal District in question did not function as required by the statutes and rules applicable thereto, but that such Jury Commissioner had unlawfully and wrongfully delegated the duties of such office to the Clerk of the Court, or, in part, to the Marshal of such Court. Counsel for Pieri further stated to the Court that information had been received by such counsel to the effect that the selection of names was one under a "sponsorship" system, which did not in fact result in a reasonably fair representation of the community, or a reasonable cross-section of the community, and that the selection of names, placement of names in a jury wheel, withdrawal of the names from the jury wheel, and control of the mechanics of such selection and placement were not as provided for by statute and rule.

Counsel for Pieri thereupon demanded that the Jury Commissioner be sworn so as to permit an examination of such Jury Commissioner on the various questions raised (jury minutes, A. M. of November 4th).

In reply to such demand of counsel, the Court made answer, "I will not." (Jury minutes, A. M. of November 4th).

Counsel for defendant-appellant Pieri took exception to such ruling of the Court. All defendants joined in the application of defendant-appellant Pieri and joined in the exception to the Court's ruling, except the defendant, Riccobene.

For information of the Court, be it noted that the defendant Pieri is of Italian national extraction, as were most of the defendants on trial. Two of the defendants were of Negro blood, and one defendant of Slavic-Jewish blood.

It is submitted by defendant Pieri that the ruling of the Court was clear error, and substantial error. In *Dow vs. U. S. Steel,* 195 F. 2d 478, 1955 (3 C. A.), the Circuit Court of Appeals remanded to the District Court because of a similar ruling by a trial court. In the *Dow* case, plaintiff's attorney had moved to strike the trial array, on several stated grounds and had moved for a hearing on the issues raised in that connection. The trial Court denied the motion to strike the trial array, and denied the motion for a hearing in connection with such matters, and in review, the Circuit Court of Appeals held that such a question is proper grounds for inquiry on trial, and that any party is entitled to a hearing to attempt to establish the facts of an unconstitutional selection. The Court of Appeals stated, in its opinion, that no Court in review can intelligently pass upon the method and manner of selecting an array if a party be precluded from presenting the facts upon which the claim of unconstitutional selection is based.

The Supreme Court of the United States has held in many instances that this be a substantive question, and has reversed convictions where an unconstitutional method of selection has been shown, or where an exclusion by class has been demonstrated. The Court has further held that it does not matter whether the exclusion is intentional or non-intentional.

Thiel vs. Southern Pacific R. R., 328 U. S. 217;
Smith vs. Texas, 311 U. S. 128;
Fay vs. N. Y., 332 U. S. 261;

Glasser vs. U. S., 315 U. S. 60;
Brinson vs. N. Carolina, 333 U. S. 851;
Norris vs. Alabama, 294 U. S. 587;
U. S. vs. Carolene Prod., 304 U. S. 144;
Piene vs. Louisiana, 306 U. S. 354;
Snowden vs. Hughes, 321 U. S. 1;
Ballard vs. U. S., 329 U. S. 187;
Cassell vs. Texas, 339 U. S. 28.

In *Ballard vs. U. S.*, cited above (1946), a conviction was reversed because women were excluded.

In *Thiel vs. Southern Pacific R. R.*, cited above (1946) a conviction was reversed because daily wage earners were excluded.

In a note made a part of the decision in the *Thiel* case, above, treatment is given as to the classes which may never be excluded, and they are designated as those classes which are cohesive, united by a common interest.

The cases have held in substance that certain classes may never be excluded, to-wit:—women, wage earners, national groups, religious groups, and those having a common political faith.

Appellant Pieri submits that where a reasonable showing, or a reasonable belief, exists that there has been such an exclusion, that a defendant is entitled to raise the issue, and is entitled to produce such proof as may be available, so as to show that such exclusion in fact exists. Appellant submits therefore that he was entitled to an opportunity by hearing to inquire into such matters and that it was clear and substantial error to deny him such right.

QUESTION NO. 9.

Whether motions to dismiss the indictment and a verdict of acquittal in favor of petitioner Pieri should have been granted by the Trial Court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

The rule applicable to this situation was pronounced by the United States Supreme Court in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946), wherein the Supreme Court reversed judgments of conviction against several supposed conspirators who had been jointly indicted under a single general charge of conspiracy. The facts of that case were markedly similar to the facts presented in the instant case:

Kotteakos and thirty-one other defendants were jointly indicted for a single general conspiracy, together with several named co-conspirators. Nineteen of such defendants were tried together. (Here eighteen.)

The case of thirteen defendants was submitted to the jury, the exact number in the instant case.

In *Kotteakos*, it was developed on trial that eight separate conspiracies were established, whereas in the present matter, it is believed not less than five separate conspiracies were established.

In the *Kotteakos* case, no knowledge on the part of one conspirator was shown to have existed as to any other supposed co-conspirators, except that one defendant was common to all conspirators. In this matter, no knowledge on the part of any set of supposed conspirators was shown, as to the existence or activity of any other supposed group of conspirators (suppliers), except that each group of suppliers was supposed to have had knowledge of the

activities of those conspirators composing the Cleveland "core."

The Supreme Court, in reversing the judgments of conviction in *Kotteakos,* used the analogy of the spokes of a wheel all meeting at a common hub (or "core") and found that an indictment charging a single general conspiracy was duplicitous, and was defective thereby, unless some cross-knowledge between the spokes of such wheel existed.

It was urged by appellant Pieri before trial, on motion for severance, and again at the end of the Government's case, again at the end of the entire case, also after verdict, and also in support of a motion for new trial, that such variance existed, that acquittal should be directed, because of the necessary confusion resulting from the proof of all such separate conspiracies, and that substantial error had occurred.

The Government relied upon *Bruno vs. U. S.,* 105 F. 2d 921 (C. A. 2) (1939), which occurred before the decision in *Kotteakos,* upon *U. S. vs. Tramaglino,* 197 F. 2d 928 (C. A. 2) (1952), and upon *Berger vs. U. S.,* 295 U. S. 78 (1935), again before *Kotteakos.* It is significant that the Supreme Court itself distinguished between its decision in *Berger,* cited above, and in *Kotteakos,* stating in substance, that in *Berger* only a few defendants were concerned, and that although variance existed, still denial of motions based thereon, while error, did not constitute substantial error, it not being shown that the jury in *Berger* was necessarily confused.

Both the majority and minority of the Court however, in *Kotteakos,* referred to *Berger,* and considered the applicability of its own doctrine, to-wit: that a case might well come before the Court where, on showing of variance and denial of motions based thereon, such denial might

well be substantial error. The majority and minority differed only on the question in *Kotteakos*, as to whether a point of confusion had been reached, and whether, necessarily, substantial error had occurred, because of the nature of such mass trial.

In *Tramaglino*, cited above, it was proved on trial that all defendants had knowledge of the activities of co-conspirators, and, as a consequence, such case does not come within the application of the rule in *Kotteakos vs. U. S.*

Attention is called to the comment of the majority in *Kotteakos* as to the harm that may result from a loose application of the practice permitting joinder of multiple defendants in conspiracy counts, because of the tremendous difficulty imposed on defendants in mass trials to successfully combat those issues raised solely as to such defendant, but necessarily lost in the confusion of trial.

See also the opinion of the Ninth Circuit Court of Appeals, in *Canella vs. U. S.*, 157 F. 2d 470, where five conspiracies were established, and only twelve defendants were involved. In that instance, convictions were reversed because of the applicability of the rule in *Kotteakos vs. U. S.*

QUESTION NO. 10.

Whether the Court's refusal to enter judgment of acquittal as to Counts 11 and 16 as against Pieri and Poliafico constituted reversible error inasmuch as variance was shown between the charge in the indictment and the proof that was adduced at the trial.

The testimony of the witness Mandanici, an accomplice, clearly established, and such witness conceded, that appellant Pieri participated in no activity in the Northern District of Ohio. Such testimony of such witness further clearly established that the activities of such Pieri

as to conversations, supposed conversations, supposed dealings and supposed activities, all occurred in the City of Buffalo, New York, or in the City of Erie, Pennsylvania.

As stated heretofore, the Government conceded at the end of the Government case that the substantive charges as to appellant Pieri might be dismissed; sale Counts 10 and 15 were dismissed; Counts 11 and 16 on transportation, concealment or facilitation were submitted to the jury.

The basis of the Court's ruling, to which exception was taken, was to the effect that since possession at one time was found to be in appellant Pieri, that such possession was sufficient to carry over in a continuing or constructive sense, and that the presumption stemming from possession, arising from Section 174, Title 21, U. S. C., carried with it a presumption of venue. Even if the Court's ruling on this point was correct, it is submitted that any presumption of venue was destroyed by the actual proof adduced on trial, under the doctrine of *Casey vs. U. S.*, 276 U. S. 413, 48 S. Ct. 373, 72 L. Ed. 632.

The attention of the Court is called to those matters relating to double punishment treated in the brief submitted on behalf of appellant Poliafico.

The attention of the Court is also directed to *Wrightson vs. U. S.*, 222 F. 2d 556, to the effect that an abundance of evidence is not sufficient to warrant an affirmance if substantial error be shown, but that a reversal must be directed, even though guilt seems clear.

Appellant Pieri vigorously contends innocence, and does not concede guilt, but urges that even though guilt were clearly shown, substantial error has been shown and that an acquittal must be directed.

QUESTION NO. 11.

Whether there was competent proof that the substance alleged to have been sold by petitioner Crisci was heroin.

The testimony of Frank Consolo showed that Riccobene was carrying a cigar box containing half a kilogram of "white powder" wrapped in a cellophane package, and that when he got to Consolo's apartment he showed him and the petitioner Crisci how to cut the powder. Consolo referred to the substance as heroin. There was no evidence, however, that it was in fact heroin or any form of narcotic. A conviction cannot be sustained in the absence of such proof.

It was again testified by Mandanici that while he and Poliafico drove along highway 422 they saw a car bearing petitioners Crisci and Naselli coming from the opposite direction. That Poliafico got out and talked with Crisci and Naselli and later came back and handed Mandanici a package which Mandanici stated was heroin, and that he sold this half a kilogram to one Steve Simmons. Aside from this reference to the package as heroin, there is no proof whatsoever as to the contents of the package.

Proof of possession of unstamped narcotics gives rise to a presumption of guilt of the substantive offenses of transporting and selling, prohibited by 21 U. S. C. 174 and 26 U. S. C. 2553(a); *McDade vs. United States*, 206 F. 2d 494 (6 Cir. 1953); *Copperthwaite vs. United States*, 37 F. 2d 846 (6 Cir. 1930). However, there must be actual proof that the substance in the defendant's possession consists of a narcotic drug. That proof constitutes the corpus delicti of the offense; *United States vs. Tramaglino*, 197 F. 2d 928; *United States vs. Stallsworth*, 193 F. 2d 870, 873.

Likewise, in a prosecution for conspiracy to commit an offense against the narcotic laws there must also be independent proof that the "stuff" dealt with does in fact consist of narcotics. It is clear that there can be no conviction for conspiracy unless the object of the conspiracy is in itself illegal: *Gebardi vs. United States,* 287 U. S. 112 (1952); *Fulbright vs. United States,* 91 F. 2d 210 (7 Cir. 1937). Thus there can be no conspiracy to violate the narcotic laws without actual proof of the existence of narcotics. And evidence of narcotics is part of the proof offered by the Government in every case. See e.g.: *United States vs. Pisano,* 193 F. 2d 355 (7 Cir. 1951); *United States vs. Cohen,* 124 F. 2d 164 (2 Cir. 1941); *United States vs. Adelman,* 107 F. 2d 497 (2 Cir. 1939). *Cf. Grabenheaimer vs. United States,* 194 F. 2d 447 (6 Cir. 1952).

QUESTION NO. 12.

Whether there was error in the Court's refusal to correctly charge the jury on the effect of the defendant Crisci's failure to testify.

Counsel for Crisci requested the Court to charge that the failure of a defendant to take the witness stand "does not create any presumption against him." The Court stated that this charge "will be given in substance" and charged the jury as follows:

> "* * * you are not permitted under the law to draw any inference of guilt because of the fact that any of these defendants failed to testify in his own behalf."

It is submitted that the charge was erroneous. The Criminal Code provides expressly that the failure of a defendant to testify "shall not create any presumption against him"; 18 U. S. C. Sec. 3481. The defendant Crisci

was entitled to a charge in the language of the statute. An "inference of guilt," is more restricted than "any presumption against him"; *Morgan, Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906 (1931); *Wigmore*, Sec. 2490-2540.

In *Bruno vs. United States*, 308 U. S. 287 (1939), the Supreme Court, speaking through Mr. Justice Frankfurter, held that a defendant is entitled to a charge in the exact language of the statute, stating:

> "Concededly the charge requested by Bruno was correct. The Act of March 16, 1878 (now 18 U. S. C. 3481) gave him the right to invoke it."

The Court further stated that the failure to acknowledge "the right of an accused to insist on a privilege which Congress has given him" is not a mere "technical error." See also *Bollenbach vs. United States*, 326 U. S. 607 (1946), in which Mr. Justice Frankfurter stated: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

QUESTION NO. 13.

Whether the Trial Court erred in curtailing the cross-examination of the witness Mandanici on the supposed basis of privilege attaching to a prior attorney and client relationship.

We submit that two independent errors were committed in this connection.

Mr. Redmond, attorney for defendant Boda, had at one time been attorney for Mandanici. Of course, we recognize that in consequence thereof Mandanici could not, without his own waiver or consent, have been interrogated concerning any confidential communications to Mr. Redmond or Mr. Redmond's advice thereon. However, this

was not the subject-matter of the proposed inquiry, for Mr. Redmond propounded the following query:

> "Did you ever tell your friends that lived in your neighborhood that you were not the one that left two ounces of narcotics under a mail box?"

This was quite patently a question being asked as a foundation for the impeachment of the witness, and certainly there was nothing to show that Mr. Redmond had derived information relating to its subject-matter from Mandanici himself. A colloquy ensued between Mr. Redmond and the Court wherein the attorney assured the Court that the statement was not made in Mr. Redmond's presence but emanated from other persons; it further appeared that the alleged statement had been made at the time when Mr. Redmond was representing Mandanici. That appeared to conclude the matter, for the Court thereupon sustained objection thereto. We submit that where a lawyer representing a client learns during the period of representation that the client made certain statements to others, the lawyer deriving the information from a source other than the client, and the lawyer ceases to represent that client, the lawyer may properly, in defense of a different client, use that information even though the effect be to impeach the former client. There is nothing in the confidential relationship which bars such evidence, and the privilege may not be so extended. Any such rule would be completely outside the well-understood scope of privilege, and would needlessly circumscribe a lawyer in the defense of the client whom he ultimately represents.

Nothing is better established with regard to the privilege attending communications between attorney and client than that the privilege is that of the client, who is free to waive it whenever he sees fit. For the purposes of

the present argument, let it be assumed—though, frankly, we are unable to perceive how it can be brought within the ambit of privilege—that Mr. Redmond's line of interrogation was such as to be presumptively prohibited by virtue of his former representation of Mandanici. It would still follow that Mandanici was quite free to waive his rights in the premises and testify on the subject if what he was called on to say was otherwise competent. Nevertheless, Mr. Meltzer, counsel for Lazzaro, proposed this question in the course of cross-examination:

> "I want to ask him whether he at this time is willing to waive the privilege so that he can relate to us what the conversation was."

The Court suggested that the question be objected to, and then proceeded emphatically to sustain the objection. The result was that the defense was held not entitled even to ascertain whether Mandanici would be willing to waive the privilege. Therefore, even on the basis of the existence of possible privilege, which the former client surely was permitted to forego, the defense was precluded *in limine* from determining whether the doubtful veil might be lifted.

CONCLUSION.

In view of the numerous instances of probable prejudicial and reversible errors, as set forth herein, some of which involve constitutional questions, it was not possible to have a fair trial and for the other reasons discussed in this Petition for Certiorari, it is respectfully submitted that this petition should be granted.

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